IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76- 76-1105

RAMSEY CLARK,

Appellant ~~Petitioner~~,

and

UNITED STATES OF AMERICA,

Intervenor,

v.

FRANCIS R. VALEO, *et al.*,

Appellees ~~Respondents~~.

JURISDICTIONAL STATEMENT ON APPEAL FROM, ~~AND PETITION FOR WRITS OF CERTIORARI TO~~, THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT ~~AND THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA~~

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Ramsey Clark, a plaintiff below, appeals from the judgments of the United States Court of Appeals for the District of Columbia Circuit, sitting *en banc*, and the three-judge District Court for the District of Columbia in these two virtually identical cases. In the alternative, Ramsey

Clark petitions for writs of certiorari to review the aforementioned judgments. Both courts below declined to resolve the issue of the constitutionality of the one-house Congressional veto because of their determinations that the issue is not ripe and that judicial prudence dictates abstention.

The merits of the one-house veto issue affect not only the operation of the Federal Election Commission, but also bear upon the validity of numerous other statutes containing similar provisions, as well as several bills and proposals under active consideration, including President Carter's plans for a major reorganization of the Executive branch. Because of the need for a prompt resolution of the important questions presented, plaintiff urges this Court to review not only the lower courts' ripeness determinations, but also to resolve the purely legal question of the constitutionality of the one-house veto, based upon the full record which the parties prepared in the district court. Such a procedure was followed in *Buckley v. Valeo,* 424 U.S. 1, 109-43 (1976), where the same court of appeals found an analogous issue relating to the composition of the Federal Election Commission to be unripe, but this Court reversed that ruling and struck down the statute as violative of separation of powers principles.

OPINIONS BELOW

The order of the district court (App. I at 52a) including findings of fact, which certified five constitutional questions to the court of appeals, has not been reported.[1]

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[1] "App. __ at ____" refers to the designated volume and page, respectively, of the three-volume Appendix submitted herewith.

The opinion of the *en banc* court of appeals with concurring and dissenting opinions (App. II at 1-119) has not yet been reported. The judgment of the three-judge district court (App. I at 79a) in the portion of the case not certified to the court of appeals has not been reported.

JURISDICTION

The Federal Election Campaign Act, 2 U.S.C. § 437h(b), provides that:

> Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United States.

Accord, 26 U.S.C. § 9011(b)(2). It is further provided in 2 U.S.C. § 437h(c) that:

> It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a).

Although the court of appeals stated that it was not deciding the questions certified by the district court (App. II at 10), it in fact did decide the first question, which was whether an action brought by a voter and candidate to challenge the constitutionality of an election law, under statutory provisions providing for immediate review at the request of any voter, met the Article III "case or controversy" requirement (App. II at 10; *see* App. II at 8 n.2 and App. I at 53a). In order to eliminate any uncertainty concerning the proper method of seeking review, plaintiff Clark requests that these appeals also be treated as petitions for writs of certiorari. 28 U.S.C. § 2103.

The judgment of the court of appeals was entered on January 21, 1977 (App. II). A timely notice of appeal was filed in the court of appeals on February 7, 1977 (App. I at 10a). The jurisdiction of this Court on appeal from that judgment is invoked under 2 U.S.C. § 437h(b). *See Buckley v. Valeo,* 424 U.S. 1, 10 n.6 (1976). The jurisdiction of this Court on the petition for a writ of certiorari to the court of appeals is invoked under 28 U.S.C. § 1254(1).

The judgment of the three-judge district court was entered on January 21, 1977 (App. I at 79a). A timely notice of appeal was filed in the district court on February 7, 1977 (App. I at 13a). The jurisdiction of this Court on appeal from that judgment is invoked under 26 U.S.C. § 9011(b)(2), and 28 U.S.C. § 1253. *See Buckley v. Valeo, supra,* 424 U.S. at 10 n.6. The jurisdiction of this Court on the petition for a writ of certiorari to the district court is invoked under 28 U.S.C. §§ 1254(1) and 1651. *See United States v. Nixon,* 418 U.S. 683, 686-87 (1974) (and cases cited in note 1 thereof).

STATUTES INVOLVED

The Federal Election Campaign Act, 2 U.S.C. §§ 431, *et seq.*, as amended, (hereinafter the "FECA") and Subtitle H of the Internal Revenue Code of 1954, 26 U.S.C. §§ 9001, *et seq.*, as amended, (hereinafter "Subtitle "H") are fully set forth in volume III of the Appendix submitted herewith. The specific provisions of those statutes which are challenged here as unconstitutional are those providing that a single House of Congress may disapprove regulations of the Federal Election Commission. 2 U.S.C. § 438(c); 26 U.S.C. §§ 9009(c) and 9039(c) (App. III at 32-34; 63-64; 77).

QUESTIONS PRESENTED

The following constitutional questions, which were certified to the court of appeals pursuant to the procedure established by 2 U.S.C. § 437h(a) (App. III at 30), are the questions appellant-petitioner brings to this Court.

1. Does this action challenging the constitutionality of § 315(c) of the Federal Election Campaign Act (FECA), 2 U.S.C. § 438(c), and §§ 9009(c) and 9039(c) of Subtitle H of Internal Revenue Code of 1954, 26 U.S.C. §§ 9009(c) and 9039(c), present a justiciable case or controversy under Article III of the United States Constitution?

2. Do 2 U.S.C. § 438(c), and 26 U.S.C. §§ 9009(c) and 9039(c), which allow a single House of Congress to disapprove rules and regulations, or selected portions thereof, adopted by the Federal Election Commission, violate the principles of separation of powers and checks and balances established by Articles I, II, and III of the Constitution; are they in derogation of the Presidential veto power in Article I of the Constitution; and are they in excess of the legislative powers enumerated in Article I of the Constitution?

3. Do the challenged provisions specified in questions one and two violate the right of a candidate for Federal office to Due Process of Law under the Fifth Amendment of the United States Constitution by: a) depriving him of the right to have laws affecting him enacted by the full legislative process, including passage by both Houses of Congress with the opportunity for a Presidential veto; and, b) invidiously discriminating against him in allowing incumbent officeholders, but not challengers, to veto rules and regulations of the Commission?

4. Do the challenged provisions violate the Constitution by delegating the discretion to disapprove regulations of the Federal Election Commission to a single House of Congress without fixing any standards or criteria to govern the exercise of such discretion and without requiring any statement of reasons for the exercise of such discretion?

5. Do the challenged provisions, by allowing a single House of Congress to disapprove rules and regulations, or selected portions of such rules and regulations, adopted by the Federal Election Commission, create an extra-Constitutional legislative process in violation of Article I?

STATEMENT

This action challenges the constitutionality of election statutes which permit a single House of Congress to veto regulations adopted by an independent agency, the Federal Election Commission (the "Commission"). 2 U.S.C. § 438(c); 26 U.S.C. §§ 9009(c) and 9039(c). This issue was argued, but not decided, in *Buckley v. Valeo*, 424 U.S. 1 (1976), because of this Court's ruling that the Commission as then constituted transgressed principles of separation of powers. Since the Commission could therefore not issue any rules, the necessity for deciding whether such rules could be vetoed by one House of Congress was obviated. *Id.* at 140 n.176. However, the Commission has now been reconstituted as an Executive agency, its rulemaking powers have been continued, and the question of whether the one-house veto violates separation of powers principles cannot be avoided.

A. Background

The 1974 statute establishing the Federal Election Commission also created a vast array of complex reporting requirements and imposed stringent spending and contribution limitations. It was plain that the law was not entirely self-explanatory and that candidates, political committees, and the public at large needed regulations to fill in the gaps. In the nearly two years since the Commission began operations, it has made every effort to issue these badly needed regulations, but has, to date, been unsuccessful, largely because of the intercession of two separate one-house vetoes and the extensive delays resulting from the necessity felt by the Commission to negotiate the substance of any regulations with relevant Congressional committees prior to transmittal to Congress.

The first regulations that the Commission sought to put into effect were those dealing with office accounts of federal officeholders, including Members of Congress. On July 30, 1975, the Commission sent to Congress rules that would have required the disclosure of contributions to, and expenditures from, office accounts of federal officeholders, including excess campaign funds (Stip. ¶¶ 22-24, App. I at 60a-61a).[2] The proposal evoked an immediate negative response from affected Members of Congress (Stip. ¶ 25, App. I at 61a). Thereafter, Commission hearings were held, the regulations were redrafted, and on September 30, 1975, a modified version was transmitted to Congress (Stip. ¶¶ 26, 28-31, App. I at 61a-62a).

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[2] "Stip. ¶__" refers to the designated paragraph in the Stipulation as to Findings of Fact dated September 2, 1976, and certified to the court of appeals in the district court's certification Order of September 3, 1976.

Yet, when the proposal came to the Senate floor, a proposal to approve the modified version of the office accounts regulation – *i.e.*, to require Members of Congress running for re-election to disclose their office accounts – failed by a single vote. Thereafter, both versions of the FEC's regulation were vetoed by a voice vote (Stip. ¶35, App. I at 62a).

The only other regulations on which either House of Congress has ever taken action – those relating to the place of filing of campaign reports and statements respecting Congressional elections – were also defeated, this time by the House (Stip. ¶¶36, 40, App. I at 63a). Those regulations, which were originally transmitted on August 1, 1975, would have required campaign reports to be filed initially with the Commission, rather than with the House and Senate as most Members of Congress preferred (Stip. ¶¶40, 41, App. I at 63a). While the matter was pending before Congress, Wayne Hays, then chairman of the House Administration Committee, met with Thomas Curtis, then chairman of the Commission, to discuss the document-filing regulations (Stip. ¶¶38, 39, App. I at 63a). It was later reported to the House of Representatives that they discussed "a compromise revision," sought to establish a "working relationship between the Commission and the Congress," and recognized the need to consult in advance of transmittal to "permit compromise to occur and legitimate concerns to be raised before the 30-day clock starts ticking." 121 Cong. Rec. H 10186 (daily ed. October 22, 1975). However, an agreement on a revision was apparently not reached, and on October 22d, the House accepted the recommendation of the Hays Committee and voted to disapprove the document-filing regulations (Stip. ¶40, App. I at 63a).

In December 1975 and January 1976 additional regulations were transmitted by the Commission to Congress (Stip. ¶42, App. I at 64a), but the statutory periods had not expired on January 30 (Stip. ¶44, App. I at 64a), when this Court handed down *Buckley v. Valeo,* holding, *inter alia,* that the Commission as then constituted was unconstitutional because its members were not all appointed in accordance with Article II, § 2, cl. 2 of the Constitution. The Congress subsequently recreated the Commission as an independent Executive agency, but left the one-house veto provision intact (Stip. ¶¶46-47, App. I at 65a).[3]

On May 26, 1976, the Commission published a comprehensive set of proposed regulations encompassing matters such as disclosure of contributions, limitations on both spending and contributions, corporate and union political activity, matching funds to candidates in Presidential primaries, convention funding, and compliance procedures, as well as rules dealing with office accounts and document-filing on which earlier regulations had been vetoed (Stip. ¶48, App. I at 65a). There was a comment period, during which the Commission heard oral testimony and accepted written submissions from the public (Stip. ¶¶53-59, App. I

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[3] The 1976 amendments altered the Congressional veto provision in two respects to tighten Congressional control over the Commission. First, section 438(c)(5) was added to make clear that either House could disapprove any portion of a rule which that body concluded was a "single separable rule of law." Second, the 1976 amendments extended the scope of the veto provisions to advisory opinions of general applicability, including those previously issued. *See* 2 U.S.C. § 437f(a) and § 108(b), Pub. L. 94-283, 90 Stat. 482, *reproduced following* 2 U.S.C. § 437f(c).

at 67a). By June 25th the Commission had reached a number of decisions, tentatively approving some regulations, sending others back to the staff for further drafting, and deferring decisions on others (Stip. ¶61, App. I at 68a). As a result, the Commission was then in a position to cite these decisions to the public as its current thinking on questions which were vitally affecting the campaigns then in progress; it could not, however, hold them out as Commission regulations because they had not yet been sent to Congress for the required time (Stip. ¶62, App. I at 68a-69a).

At the Commission's July 8th meeting, further discussions took place concerning the schedule for sending the regulations to Congress for the thirty-legislative-day consideration period. It was concluded that pre-transmittal Congressional consultation was necessary, but that, because key Congressional aides were then away at the Democratic Convention, no meeting with Congressional staffs could be held until July 21st (Stip. ¶64, App. I at 69a). In fact, those meetings were delayed until July 27 and 28 and then on July 29 and 30 the Commission met and approved the final regulations (Stip. ¶¶65-67, 77, App. I at 70a-71a). While not all of the Congressional suggestions were adopted, several were (Stip. ¶¶68-73, App. I at 70a-71a). Among the adopted amendments was one relating to office accounts, which reduced the number of times per year that reports had to be filed, and changed the date of filing to relieve Members of Congress from alleged burdens (Stip. ¶¶74-76, App. I at 71a).

On August 3, 1976, the Commission transmitted to Congress the comprehensive regulations first proposed in late May, along with other regulations governing the general Presidential election which had also been approved

in late July (Stip. ¶¶77-80, App. I at 71a-72a). However, even though these regulations were never vetoed, they have not become effective because thirty "legislative" days – *i.e.*, days on which both the House and Senate were in session[4] – did not pass prior to the October adjournment of the Congress *sine die*. Thus, the entire 1976 election passed without any implementing regulations. Moreover, since the legislative clock commenced anew with a new Congress, regulations which have again been transmitted to Congress must lie for a full thirty legislative days before they can be made effective, if not vetoed. *See* 123 Cong. Rec. S 1802-03 (daily ed. Jan. 31, 1977). Only time will tell whether they will become effective in time for the special elections to fill the House seats of the three Members who have resigned to take positions in the Executive branch.

B. Proceedings Below

The complaint in this action was filed on July 1, 1976, by plaintiff Clark, a voter and then candidate for the Democratic nomination for United States Senator from the State of New York. The defendants, the Secretary of the Senate, the Clerk of the House, and the Federal Election Commission, had also been the defendants in *Buckley v. Valeo, supra*. On August 27th, the United States was allowed to intervene permissively in support of plaintiff's position that the Congressional veto is unconstitutional. On September 2d, a stipulation of facts, prepared by the parties and consisting of 81 paragraphs, was presented to the district court, along with a proposed order certifying five constitutional

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[4] 2 U.S.C. §438(c)(4); 26 U.S.C. §§ 9009(c)(3) and 9039(c)(3).

questions to the court of appeals for its consideration. The following day, the stipulation was adopted by the trial court as its findings, and a slightly modified version of the certification order was signed and filed (App. I at 52a-55a). A request for the convening of a three-judge district court was also entered. That same afternoon the court of appeals, noting the impending New York primary on September 14th, issued an order establishing an accelerated briefing schedule and setting oral argument for September 10th.

Both plaintiff Clark and the United States extensively briefed each of the five certified questions, but the defendants chose to brief only the first – justiciability. Defendants Valeo and Henshaw later filed *amicus curiae* briefs on the merits of the one-house veto issue in two other cases, but they declined to submit them in this case.[5]

The *en banc* court of appeals and the three-judge district court sat together to hear oral arguments as scheduled, but it was more than four months later before the courts issued their decisions. The court of appeals issued a per curiam opinion, three concurring opinions, and two dissenting opinions totaling 119 pages in all (App. II). The three-judge court simply expressed agreement with the result reached by the majority of the court of appeals (App. I at 79a-80a). By a vote of 5 to 2, the appellate court held that this case does not present an Article III "case or controversy" because "the unripeness of the action is so pervasive" (App. II at 10). The per

[5] *McCorkle v. United States*, No. 76-1479 (4th Cir.); *Atkins v. United States*, Nos. 41-76, *et seq.* (Ct. Cl.). *See* note 18, *infra*.

curiam opinion indicated that there could be no ripe controversy at least until there was a one-house veto of regulations of the reconstituted Commission (App. II at 15-16). Although the court was aware that two regulations had already been vetoed (App. II at 24), it apparently viewed the injury resulting from those one-house vetoes as insufficient to create a ripe controversy because those were regulations of a "legislative" Commission, rather than an "executive" Commission (*see* App. II at 15, 24). Although plaintiff Clark had alleged a present injury resulting from *pre*-transmittal delay caused by the Commission's consultations with House and Senate staffs over the substance of these regulations in order to avoid a veto, the per curiam opinion did not consider that injury, but addressed a different question – whether cognizable injury resulted from *post*-transmittal delay in Congress. This latter question the majority answered in the negative on the grounds that *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941), had upheld the constitutionality of "lying-over" periods (App. II at 12-15).

The majority further stated that plaintiff Clark had "identified no proposed regulation tainted by the threat of veto on review" (App. II at 11), and that the United States had not claimed that the regulations were "tainted with political interference" (App. II at 12). Although both plaintiff Clark and the United States relied heavily upon this Court's ripeness ruling in *Buckley* on the issue of the composition of the Commission, the per curiam opinion relegated that case to an appendix, where it concluded that "it seems fair to say that the separation of powers questions inherent in Section 438(c) were more starkly presented by the facts obtaining in *Buckley* when the [Supreme] Court considered it" (App. II at 24). Thus, according to the court of appeals, this Court's

decision in *Buckley* not to resolve the one-house veto issue supported a refusal to resolve it in this case also. *Id.* Finally, the majority below held that even if this case did present an Article III case or controversy, the court "would nevertheless refuse to reach the merits of the unicameral veto under the doctrine of judicial prudence enunciated in *Samuels v. Mackell*, 401 U.S. 66, 73 (1973)" (App. II at 16-17 n.10).[6]

Judge Wilkey concurred in the result reached in the per curiam opinion, but did not join the opinion (App. II at 18). A separate concurrence by Judge Tamm, joined by Judges Bazelon and Wright, expressed the view that the United States lacked independent standing to challenge the actions of one branch of the Government as an unconstitutional invasion of the powers of another branch (App. II at 27-35). In a third concurrence, Judge Leventhal expressed the view that he would have preferred to decide the case on the non-constitutional ground that it lacked ripeness because of prudential considerations (App. II at 36-51), and suggested that the constitutionality of the one-house veto might turn on the reasons for a particular veto (App. II at 38-41).

In the two lengthy dissents, Judges Robinson and MacKinnon each concluded that plaintiff Clark had standing as a voter (App. II at 73-76, 83-97) and that the case was ripe for adjudication (App. II at 54-72, 83-86). Moreover, Judge MacKinnon expressed the opinion that plaintiff Clark's standing as a candidate was not mooted by his failure to be elected, since the case is "capable of repetition,

[6] *Samuels*, a companion case to *Younger v. Harris*, 401 U.S. 37 (1973), was a case in which this Court determined that for reasons of federalism, Federal district courts should not interfere with ongoing State criminal prosecutions by issuance of declaratory relief.

yet evading review" (App. II at 109-11 n.21). Finally, Judge MacKinnon alone reached the merits of the constitutional challenge to the one-house veto provision, declaring that it subverted "the constitutional legislative process" and violated the Presidential veto provisions of Article I, § 7, cl. 3 (App. II at 109).

THE QUESTIONS ARE SUBSTANTIAL, AND SO THIS COURT SHOULD SET THE CASE FOR ARGUMENT AS EXPEDITIOUSLY AS POSSIBLE.

This case raises issues of fundamental importance left undecided by this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), issues which are at the heart of our tripartite form of government as embodied in the principles of separation of powers and checks and balances. The Congressional veto provisions challenged here are typical of dozens of others which are contained in a variety of statutes and which are proposed to be extended to all regulations of the entire Executive branch. *See* p. 31, *infra*. If upheld, these statutes would fundamentally alter the balance of power in our Government by permitting a single House of Congress, acting without any role for the other House or the President, to write its own laws and effectively frustrate implementation of entire legislative enactments.

The court below recognized that this issue is "momentous" (App. II at 16), and voiced agreement with the Justice Department's characterization of this case as a "continuation of a dispute of major constitutional proportions which has been brewing for forty years" (*id.*). It was also aware that Congress recognized the serious constitutional questions raised by this regulatory system, and that

Congress had sought to insure that there would be an immediate and certain resolution of constitutional challenges. 2 U.S.C. §437h. Nonetheless, the court of appeals declined to reach the merits of the controversy. Because the court below erred in failing to follow this Court's ruling of last Term in *Buckley* on precisely the same ripeness issue, and because the legal issue presented by the one-house veto needs no further development, but does need prompt resolution, plaintiff Clark urges this Court to note probable jurisdiction, or to grant writs of certiorari, on all questions presented. The parties have made as complete a record as they desired, and the time is now for the adjudication of the constitutionality of the one-house veto.

I. THE COURT BELOW MISCONSTRUED THIS COURT'S RULING IN *BUCKLEY*, AND ERRED IN REFUSING TO FOLLOW AN EXPLICIT CONGRESSIONAL COMMAND TO EXERCISE ITS JURISDICTION.

In enacting the Federal Election Campaign Act, Congress was aware that the Act raised many important constitutional questions requiring prompt resolution in order to effectively implement the badly needed election reforms embodied in the Act. For this reason, Congress included sections in both the FECA and Subtitle H, requiring the courts to resolve all constitutional challenges as expeditiously as possible.[7] However, the court below refused to acceed to the congressional command to exercise its

[7] 2 U.S.C. § 437h(a); 26 U.S.C. § 9011(b). Senator Buckley stated during the debate on the Election Act:

(continued)

jurisdiction at the behest of any voter and dismissed on the grounds of ripeness and judicial prudence. In so doing, the court rendered a decision which is directly in conflict with this Court's holding in *Buckley v. Valeo, supra*, a case construing the very same statute at issue here, but which the court of appeals' per curiam opinion discussed only in an appendix.

In *Buckley*, several plaintiffs, including individual voters and a candidate for the Senate in New York, called upon the court of appeals to decide the merits of a large number of constitutional questions arising under the 1974 amendments to the election laws. Although resolving most of those issues, the court of appeals expressly declined to rule on whether the method by which the Commission was appointed violated principles of separation of powers, relying on the same ripeness grounds that it used here in refusing to reach the merits. *Buckley v. Valeo*, 519 F.2d 831, 891-97 (1975). This Court, however, disagreed with that ruling, found the question to be justiciable, and concluded that the Commission had been unconstitutionally appointed. *Buckley v. Valeo, supra*, 424 U.S. at 109-43. This Court then turned to the question of whether the one-house veto was constitutional, but declined to decide that issue because of "our holding that the manner of appointment of the members of the Commission precludes them from

[7] (continued)

. . . if, in fact, there is a serious question as to the constitutionality of this legislation, it is in the interest of everyone to have the question determined by the Supreme Court at the earliest possible time. [120 Cong. Rec. 10562 (April 10, 1974)].

exercising the rulemaking powers in question . . . ." *Id.* at 140 n.176. This was certainly a reasonable course since Congress might well have re-evaluated the one-house veto in light of the holding in *Buckley*, and since the parties and numerous *amici curiae* had cumulatively devoted only about four pages of their briefs to this far-reaching issue.[8] Nonetheless, Justice White considered the one-house veto question to be sufficiently ripe and sufficiently important to discuss it in his separate opinion. *Id.* at 282-86.

In this case, a voter and candidate for the Senate in New York again challenges the constitutionality of the one-house veto provision, an issue that is now timely since the Election Commission has been reconstituted with rulemaking powers. However, the D.C. Circuit has once again held that the issue is not ripe. Essentially, the majority below ruled that, absent an actual veto of regulations of the reconstituted Election Commission (there were two vetoes of regulations of the former "legislative" agency), Ramsey Clark as a voter had no "personal stake" in the outcome (App. II at 11) and no ripe controversy existed. Thus, while phrasing its dismissal in terms of ripeness, the majority focused on issues generally associated with standing, and held that a voter seeking redress of injuries inflicted by a Congressional interference with a supposedly independent, executive Commission regulating elections, failed both Article III and prudential justiciability tests, even though Congress has made a legislative determination that

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[8] *See* Brief of Appellants 208 n.9; Brief of the Attorney General as Appellee and the United States as *Amicus Curiae* 111-12 n.70; Brief of the Federal Election Commission 57-58 n.49; Reply Brief of the Appellants 112-13.

any voter does have the required personal stake. 2 U.S.C. § 437h(a); 26 U.S.C. § 9011(b)(1). In reaching this result, the majority misconstrued the test of justiciability under Article III and *Buckley*, and misconceived the nature of the injuries suffered by plaintiff Clark as both a voter and a candidate.[9]

This Court established in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), that Congress can create substantive rights and can confer standing to enforce those rights just as it did in the FECA and Subtitle H.[10] Thus, where actions by a plaintiff suing under congressional authorization would benefit the public, as is the case here, the power of Congress to confer such standing on "any person" has been upheld. *See Friends of the Earth v. Carey*, 535 F.2d 165, 172-73 (2d Cir. 1976). Moreover, this Court has held that a voter's interest in even a fraction of a vote is adequate to satisfy the requirements of Article III. *Baker v. Carr*, 369 U.S. 186 (1962). Therefore, the lower court's decision –

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[9] The majority below held that plaintiff's standing as a candidate was mooted during the pendency of this action because of his defeat in the New York primary. However, as Judge MacKinnon noted (App. II at 109-11 n.21), this case is "capable of repetition, yet evading review." *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969). The fact that plaintiff filed this suit on July 1, 1976, yet could not secure the first opinion in the case until January 21, 1977, bears out Judge MacKinnon's observation that, "[t]he normal period in most states between the close of primary filings for candidates and the date of the primary election is insufficient time within which to commence a suit and obtain a decision under normal trial and appellate procedures." App. II at 119. Indeed, the time has proved insufficient even under an extraordinarily short briefing and argument schedule.

[10] 2 U.S.C. § 437h(a); 27 U.S.C. § 9011(b)(1).

that neither a voter's personal stake in a fair election process, nor the public's stake represented by a voter authorized by Congress to sue, is sufficient to give the court jurisdiction – conflicts with fundamental decisions of this Court and threatens to invalidate numerous other statutes granting standing to any "person" or to any "citizen."[11]

In addition, this Court in *Buckley* did not require anything like the specificity in injury that the court of appeals has sought to require in the present case. Thus, in finding the composition of the Commission issue to be justiciable, this Court recognized a present injury to the voter and candidate plaintiffs, even though it was impossible to prove that Commissioners appointed by the Congress would ever vote differently from Commissioners appointed by the President. *See Buckley v. Valeo, supra,* 424 U.S. at 113-18. *See also Regional Rail Reorganization Act Cases,* 419 U.S. 102, 123-24, 138-45 (1974). The injury recognized in *Buckley* was a subtle, yet inevitable, interference with the workings of a coordinate branch of government. That same, subtle injury to the separation of powers is present here.

Moreover, plaintiff Clark has alleged three distinct, continuing injuries, which are supported by the record, and which directly result from the threat of the veto regardless of whether another veto ever occurs. First, if the office

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[11] There is a wide range of statutes granting standing to any person and their constitutionality has never been questioned. *See, e.g.,* Clean Air Act Amendments of 1970, 42 U.S.C. § 1857h-2; Noise Control Act, 42 U.S.C. § 4911; Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1365; Marine Protection, Research and Sanctuaries (Ocean Dumping) Act, 33 U.S.C. § 1415(g); Consumer Product Safety Act, 15 U.S.C. § 2073; Federal Informers Act, 31 U.S.C. § 232(B); and Freedom of Information Act, 5 U.S.C. § 552(a)(3) and (a)(4)(B).

accounts and document-filing regulations, which sought to ameliorate certain of the advantages of incumbency, had not been vetoed, the Commission would not have been forced to water them down to their present form. *See* Stip. ¶¶22-43, 74-77, App. I at 60a-64a, 71a. Second, voters and candidates alike have suffered from the delays resulting not from the "lying before Congress" provision of the Acts, but from the delays in sending regulations to Congress resulting from negotiations over the substance of the regulations with Congressional staff after the closing of the period for public commenting. Stip. ¶¶63-76, App. I at 69a-71a; App. II at 54-57 (Robinson, J., dissenting); App. II at 86-91 (MacKinnon, J., dissenting). The failure of any regulations to take effect can be traced directly to the extra month of delay caused by these negotiations. *Id.* Third, voters and candidates alike have been injured by the undue influence which the veto threat has allowed Members of Congress to exert over the substance of regulations, such as that concerning office accounts. *Id.* As stated by Judge MacKinnon, the only member of the court of appeals to have also served in Congress (App. II at 114):

> A great deal of the harm comes from the threat, the potential of a one-house veto. Indeed, if the system works the way plaintiffs allege, all either house of Congress would have to do is to influence the FEC's proposed regulations so that they always come out favorable [sic]. Then, piously, each house could refrain from any legislative action incanting, "If that's the way the FEC wants it, so be it." [footnote omitted].

The injury sought to be prevented by invalidation of the veto provision is unlikely to ever be more clearly docu-

mented than it is in the present case. Since Congress has directed that this Court exercise the full extent of its Article III jurisdiction to resolve disputes as to the constitutionality of the election laws, the one-house veto issue is ripe for decision by this Court at this time.

II. THE COURT SHOULD GRANT PLENARY CONSIDERATION TO THE CONSTITUTIONALITY OF THE ONE-HOUSE VETO.

A. The One-House Veto Is Unconstitutional.

The American constitutional system is one of affirmative grants of power: each of the three coordinate branches is limited to those powers delegated to it. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). In Article I, the Constitution explicitly delegates the lawmaking role to the Congress, comprised of the Senate and the House of Representatives, working in conjunction with the President. Nowhere in that Article, or in any other place in the Constitution, is the Congress given any power to issue rules and regulations implementing the statutes that it has enacted. Nor is there any specific provision allowing the Congress to exercise any veto power over the acts of the Executive branch when it issues such regulations, let alone is there any such authority granted to a single House of Congress. To the contrary, as explained below, this extra-constitutional power claimed by the Congress conflicts with the specific checks written into the Constitution to prevent one branch or one house from usurping the powers of other Government bodies.

The substantiality of the doubt concerning the constitutionality of the one-house veto is confirmed by the dissent

of Judge MacKinnon below (App. II at 97-109) and the fact that most scholars who have addresssd the subject have concluded that it violates one or more constitutional principles (*see* note 16, *infra*). The fundamental thrust of these objections is that the one-house Congressional veto violates what James Madison called the most "sacred" principle of our Constitution (1 Annals of Cong. 604); namely, "that the powers of the three great branches of the National Government be largely separate from one another." *Buckley v. Valeo*, *supra*, 424 U.S. at 120. Thus, under our constitutional system, no one branch may legitimately perform the functions or control the performance of another branch, unless there is an express constitutional exception—a check and balance—creating that interbranch blending of power.[12]

By considering the possible functions performed by a one-house veto of a Commission regulation, it becomes evident that it cannot be exercised consistently with the Constitution. Thus, where Congress vetoes a regulation (or secures changes by the Commission due to the threat of the veto) because the Commission has "misinterpreted" a statutory provision, the veto may be for a legitimate purpose, but the means employed are impermissible, since under the Constitution it is the judiciary, not the legislature, which is responsible for ascertaining Congressional intent and correcting executive misinterpretations. On the other hand, if the Commission's interpretation would be upheld by a court, then a one-house veto is, in effect, a rewriting of the statute by a method other than by action of both Houses of Congress and the President. Finally, if the purpose of the

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[12] *E.g.*, Article I, § 7 (Presidential veto of proposed legislation); Article II, § 2, cl. 2 (Senate's advice and consent on treaties and appointments).

Congressional veto is to implement a Congressional perception that the regulation is unclear or represents an unwise, although permissible, policy choice, then Congress is unduly interfering with the proper exercising of an executive function. Therefore, under any of these assumptions, the Congressional veto runs afoul of separation of powers principles.

Analyzing the issue from the perspective of "control," or interbranch inteference with the performance of another's responsibilities, leads to the same conclusion. Admittedly, the Congress has broad discretion in the manner in which it allocates responsibilities under a given law. However, once it statutorily assigns a power to an executive agency, such as the power to issue rules, that power becomes an executive, not a Congressional, authority. Thereafter, Congress cannot constitutionally interfere with the execution of that executive responsibility except through validly enacted legislation passed by both houses in conjunction with the President. Indeed, it makes no difference that a Congressional veto is never exercised for, as Judge MacKinnon recognized (App. II at 114), equally pervasive and pernicious interference can be exercised simply because the threat of a veto exists.

A further constitutional difficulty with the Congressional veto is that it deprives the President of his veto power under Article I, Section 7. Mr. Justice White has expressed the view that there is no constitutional infirmity regarding the Presidential veto power because regulations become effective through Congressional "nonaction" which is not the "equivalent of legislation." *Buckley v. Valeo, supra,* 424 U.S. at 284-86. However, Judge MacKinnon explained in detail why terming the Congressional veto process as "nonaction" misconceives the reality of the situation (App. II at 98-101), and a thorough review of the constitutional history of the Presidential veto clause demonstrates, we

submit, that the Framers deliberately created a single executive with the power to exercise a qualified veto on his own initiative over every bill, resolution, vote, or similar measure emanating from Congress, *which has the effect of law. See, e.g.,* M. Farrand, *Records of the Federal Convention of 1787,* vol. II, pp. 301-05 (1966); *United States v. California,* 332 U.S. 19, 28 (1947); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive,* 63 Calif. L. Rev. 983, 1066 n.428 (1975).[13] Certainly a one-house veto disapproving a regulation, which would otherwise have the effect of law, revises the law just as much as a statutory change revoking a regulation already having the effect of law. The former, like the latter, changes the law, and the former, like the latter, requires submission to the President. "In the words of Madison, the convention 'gave the Executive alone . . . the revisionary control on the laws, unless overruled by two-thirds of each branch.'" *United States v. Weil,* 29 Ct. Cl. 523, 546 (1894).

In addition, Article I, Section 1, of the Constitution vests all legislative powers "in a Congress" consisting of *both* "a Senate and House of Representatives." This bi-

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[13] The Presidential veto power was included in part to check unwise Congressional decisions, but was intended primarily as a defensive weapon to prevent Legislative encroachment upon Executive powers. *E.g.,* J. Madison, A. Hamilton, and J. Jay, *The Federalist Papers,* No. 73 (1961). It is thus especially ironic that after the Framers refused to give the President an absolute veto to defend himself from the Legislature, the Legislature should now claim the right of an absolute veto to use against the Executive. Equally ironic is the Congressional claim to a "line item" veto power, allowing Congress to modify regulations by vetoing only selected portions, another power denied the President by the Framers. *See* 2 U.S.C. § 438(c)(5); 26 U.S.C. §§ 9009(c)(4) and 9039(c)(4).

cameralism leaves no room for the two Houses to reallocate legislative authority as provided in FECA and Subtitle H, so that the House can control rules for elections to the House and the Senate can control rules for elections to the Senate. 2 U.S.C. § 438(c)(3) and 26 U.S.C. §§ 9009(c) and 9039(c). Indeed, the requirement that every legislative action be taken by both Houses was intended to prevent just the possibility of self-interested action which FECA presents. *See* Federalist No. 51. *See also* Watson, *supra*, 63 Calif. L. Rev. at 1032-43.

Bicameralism made possible the most important compromise in the formation of the Federal Union: the agreement between large and small states for apportioning representation in the House and the Senate. Each House was to serve as a check upon the other, but the one-house veto emasculates this principle by permitting one House to undo a legislative compromise by vetoing regulations adopted by the Executive to implement that compromise. Moreover, if the effective authority to modify the law can be vested in one house, it can as easily be vested in one committee or one chairperson. Indeed, this is the practical effect that the veto has created through the negotiation process which has developed between the respective Congressional committee chairmen and the Commission (Stip. ¶¶63-76; App. I. at 69a-71a). But this power to rewrite the election laws without the approval of both Houses is precisely the power forbidden by Article I, Section 1.

Another constitutional infirmity, which may be unique to the situation presented under the FECA, derives from the fact that those who sit in judgment on whether to veto the Commission's regulations are directly and personally affected by those regulations whenever they run for re-election to federal office. The conflict-of-interest problem raised is

quite different from that presented by the normal legislative process concerning election laws, where each House checks the excesses of the other, and both are checked by the President. It is not necessary to ascribe to Congress any bad faith; it is only necessary to recognize that it is almost impossible for any person to be wholly objective when as important a matter as re-election for the Member, or the election of the candidate of the Member's party for President, may be affected by the outcome of the vote. *See Gibson v. Berryhill*, 411 U.S. 564, 578 (1973). This Court has recognized that actual bias is often impossible to establish in situations such as this, and hence has ruled that due process requires disqualification where there is a "possible temptation" standing in the way of a fair determination. *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972), *quoting Tumey v. Ohio*, 273 U.S. 510, 532 (1927). *Accord, Connally v. Georgia*, 45 U.S.L.W. 3461 (U.S. Jan. 10, 1977) (No. 76-461).

Finally, even if the Members of Congress as legislators can delegate the veto power to the Members of one House as administrators, that delegation is unconstitutional in this instance because it wholly lacks standards and its exercise is not subject to judicial review.[14] Requirements for meaningful standards for exercising delegated powers are especially appropriate in cases like this where exercise of the delegated powers impacts so directly on First Amendment

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[14] In this administrative capacity, Members of Congress are seen as serving as "Officers of the United States," and this conflicts with the Constitution's incompatability clause—"no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. Const. art. I, §6, cl. 2. *See Buckley v. Valeo*, *supra*, 424 U.S. at 124-41.

interests. *See United States v. Robel*, 389 U.S. 258, 277 (1967) (Brennan, J., concurring). Since under the election laws either House has the unfettered discretion to veto a rule because it is unauthorized, unwise, or unworkable, or because it fails to retain an advantage for incumbents, or for any other reason at all, there can be no meaningful judicial review, and thus the one-house veto is also an unconstitutional delegation. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737 (D.D.C. 1971) (three-judge court).

B. The Constitutionality Of The One-House Veto Is A Question Of Such Importance That The Court Should Decide It In The Interests Of All Branches Of Government.

If the sole impact of a ruling on the merits of this case were on the rules of the Federal Election Commission, it might be advisable to obtain the views of the lower courts before this Court passed on the constitutional questions presented. Similarly, if this were an ordinary statute, and not one affecting the very process by which the leaders of our democracy are chosen, there might be a reason not to decide constitutional questions until a full airing in the lower courts had taken place. But those conditions do not obtain here since Congress has specifically mandated in section 437h that constitutional challenges to the election laws should be promptly determined by expedited appeals to this Court and because the inclusion of Congressional veto provisions has increased markedly and is likely to advance at an even faster pace, at least until a definitive ruling is issued on the constitutional question. This question is of concern to both the Executive and Legislative branches, as well as

to the public at large, and it is therefore especially appropriate that this Court resolve the issue at this time.

Although the insertion of Congressional veto provisions is quite common today, it was not until 1932 that the first one was enacted.[15] This device for aggrandizing Congressional power was used only sparsely over the next few decades, but during the late 1960's and 1970's it has emerged as a primary tool of Congressional control over

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[15] Congressional veto provisions were adopted by the Congress for the first time in 1919-20, but the only bill to reach President Wilson was vetoed on constitutional grounds. 59 Cong. Rec. 7026-27, 8069 (1920); 58 Cong. Rec. 8074 (1919). *See* Ginnane, *The Control of Federal Administration By Congressional Resolutions and Committees*, 66 Harv. L. Rev. 569, 575 (1953).

Other Presidents have also vetoed such provisions, *e.g.*, Ford, 122 Cong. Rec. H 7297 (daily ed. July 19, 1976); and every President since Herbert Hoover, supported by opinions of their Attorneys General, have argued that such provisions are unconstitutional. *See* Watson, *supra*, 63 Calif. L. Rev. at 988 n.9.

Upon occasion, Presidents have actually suggested the use of the Congressional veto mechanism in connection with proposals to grant broad new powers to the President. In these cases, however, Congress has often rejected the proposals. *See* J. Harris, *Congressional Control of Administration* 205 (1964). Newspaper accounts suggest that President Carter is at least considering agreeing to the use of the Congressional veto provision in order to secure passage of Executive reorganization authority. N.Y. Times, Nov. 18, 1976, § A, p. 1, col. 8 (city ed.). Some commentators, however, argue that the Congressional veto may be valid in the unique context of the reorganization acts, even though the veto generally cannot be upheld, and most specifically is unconstitutional as used in the election laws at issue here. *E.g.*, R. Dixon, *The Executive on A Leash: The "Congressional Veto" and Separation of Powers*, Address Before the Association of American Law Schools, Dec. 29, 1976.

Executive actions.[16] Thus, while the election laws are unique in allowing a Congressional veto over every rule issued by an entire agency, during the last session alone, Congress adopted the veto as part of ten separate pieces of regulatory legislation. *See* 123 Cong. Rec. H 499 (daily ed. January 24, 1977).

Cumulatively, according to a 1976 Congressional Research Service study, Congress has enacted 295 provisions in 196 different laws which authorize some form of Congressional supervision of Executive actions. Norton, *Congressional Review, Deferral and Disapproval of Executive Action: A Summary and Inventory of Statutory Authority* 1-10 (1976). Even though these figures include many statutes which are not currently in effect, and a large number of statutes having significant differences from those at issue here, it is evident that the Congressional veto assumes great importance in the

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[16] A number of books and articles have described the way the Congressional veto has worked in practice over the past forty-four years, and have also addressed the constitutional problems it raises. The most thorough of these are: J. Harris, *Congressional Control of Administration* 204-48, 282-84 (1964); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Calif. L. Rev. 983 (1975); Ginnane, *The Control of Federal Administration By Congressional Resolutions and Committees*, 66 Harv. L. Rev. 569 (1953). *See also* Note, *Congressional Veto of Administrative Action: The Probable Response To A Constitutional Challenge*, 1976 Duke L. J. 285; Note, *Constitutionality of the Legislative Veto*, 13 Harv. J. Legis. 593 (1976); Cooper and Cooper, *The Legislative Veto and the Constitution*, 30 Geo. Wash. L. Rev. 467 (1962); Schwartz, *Legislative Control of Administrative Rules and Regulations*, 30 N.Y.U.L. Rev. 1031, 1041-45 (1955); Neuman and Keaton, *Congress and the Faithful Execution of Laws - Should Legislators Supervise Administrators?* 41 Calif. L. Rev. 565, 587-88 (1953); Jackson, *A Presidential Legal Opinion*, 66 Harv. L. Rev. 1353 (1953).

workings of government today.[17] This importance is growing significantly greater each year as the rate of passage of statutes containing veto provisions (generally of the one-house variety) is increasing at an increasing rate. In fact, a number of bills now pending before Congress would subject every regulation of every Executive agency to a possible one-house veto, except in narrowly defined emergencies. H.R. 959; H.R. 961; H.R. 1509. *See* 123 Cong. Rec. H 499-500 (daily ed. January 24, 1977). The predecessor of one of these bills was favorably reported by the House Judiciary Committee near the end of the last session and reached the floor under a suspension of the rules, where it failed to gather the necessary two-thirds majority by only two votes. 122 Cong. Rec. H 10666-90, H 10718-19 (daily ed. Sept. 21, 1976) (debate and vote on H.R. 12048); H.R. Rep. No. 94-1014, 94th Cong., 2d Sess. (part I) (1976).

Of course, neither the other Congressional veto statutes nor the other pending bills is before this Court, and this

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[17] The listing of statutes is over-inclusive in several other respects. First, it includes many statutes which were re-enactments of earlier provisions of limited duration. Second, the list includes statutes which merely provide that Congress must be consulted, or that a rule must be allowed to sit before Congress for a fixed period of time. These are not Congressional veto statutes; they only give Congress an opportunity to consider passing another statute before the rule takes effect. Third, the list includes statutes which require affirmative Congressional approval by both Houses of specific actions proposed by the President, a very different situation from one-house disapproval. Fourth, the study also brings within its scope those statutes which require disapproval by both Houses which at least assures that principles of bicameralism are preserved, although still precluding any role in the process for the President. There are also numerous variations in wordings, periods of time involved, and types of actions to which the legislative veto is applicable. Norton, *supra*, at 1-10.

Court need not decide their legality. Nonetheless, this ever-increasing trend toward insertion of Congressional veto provisions underscores the fact that resolution of the merits of this case will have far-reaching implications for the way in which our government seeks to insure agency accountability in the foreseeable future. Just as importantly, failure to decide the issue at this juncture will only postpone the decision until a time when the impact of a declaration of unconstitutionality may have staggering effects, not only upon the relations of government branches, but upon the financial well-being of the Country, as Congressional veto provisions are increasingly being utilized in statutes affecting economic conditions.[18]

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[18] *E.g.*, Emergency Petroleum Allocation Act of 1973, § 4(g)(2), Pub. L. 93-159, 87 Stat. 627; Federal Salary Act of 1967, 2 U.S.C. § 359(1)(B). *See* Kraft, *The Perils of the 'One-House Veto'*, Wash. Post, Jan. 13, 1977, § A, p. 27, col. 1. The Congressional veto provisions in each of these acts have been the subject of legal challenges, but none of the cases is likely to result in a decision on the merits. *Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp.*, Civ. No. 75-483-P (S.D. Ala., Aug. 20, 1976), *appealed*, No. 76-3712 (5th Cir.), an action for breach of contract which also involved a challenge to the Petroleum Act veto provisions, was dismissed as to the veto issue on the ground that that plaintiff lacked standing to raise it. *Id.* slip. op. at 17-18. Likewise, both of the Pay Act cases have been strenuously defended on that ground, as well as non-retroactivity and, most importantly, non-severability grounds. *See Atkins v. United States*, Nos. 41-76, *et al.* (Ct. Cl.); *McCorkle v. United States*, No. 76-1479 (4th Cir.). The case at bar, however, is distinguishable from the Pay Act cases in that here, unlike there, the statute involved contains a severability clause, 2 U.S.C. § 454, and nothing in the legislative history suggests that, but for the Congressional veto, Congress would have withheld the power to fill in the gaps by regulation. *See Buckley v. Valeo*, *supra*, 424 U.S. at 108-09.

Finally, the issue presented is purely a legal one which has been fully briefed by the representatives of Congress, albeit not in these proceedings. There is a full record, which each party considers adequate to the task, to enable the Court to reach a determination of whether the one-house veto of rules of the Commission is consistent with the Constitution. There is nothing more that this Court needs to know in order to rule on this question, and therefore, as in *Buckley*, where the composition of the Commission was passed on without a ruling below, this is the time to decide the merits of this controversy.

CONCLUSION

The Constitution is a complex bundle of compromises and concessions, with each check and balance representing an important part of the whole without which there could have been no concensus. To allow the Congress to circumvent established checks on precipitous actions merely by labeling as non-legislation, acts having the effects of legislation, would soon undo the whole fabric of the Constitution. The dangers of the one-house veto were clearly recognized by Professor Kenneth Culp Davis in a recent letter to Congressman Elliott H. Levitas, a sponsor of several such bills. Professor Davis admonished (123 Cong. Rec. H 961-62 (daily ed. Feb. 8, 1977):

> The idea that a part of Congress, on the basis of political pressures, should set aside professional findings of fact based on a rulemaking record seems to me to be a threat to the American system of government, one of the most serious threats that have come to my attention during my lifetime. It seems to me especially dangerous

because many in Congress may vote for it in order to gain advantage for themselves. Repealing it will be difficult for the same reason, even if the damage it does is devastating.

Although I realize that you probably have the votes, I have not given up hope. Those who agree with me still have a good many lines of defense—enough Congressmen may perceive the need to maintain the proper balance between politicians and professionals, the new President may veto and induce the country to understand the dangers to the American system of government, the courts may quickly and firmly hold the measure unconstitutional (as I fully expect), and even if the measure becomes law a later Congress may realize the damaging effects and quickly repeal it.

In order to resolve these vital questions, the Court should note probable jurisdiction or, in the alternative, issue writs of certiorari as to all questions presented.

Respectfully submitted,

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